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NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Butte)

THE PEOPLE, Plaintiff and Respondent, v. JOSHUA LEE HELLMAN, Defendant and Appellant.	C079838 (Super. Ct. No. CM042449)

Defendant Joshua Lee Hellman appeals from his conviction of robbery and carjacking. He contends (1) the trial court erred by not instructing on grand theft as a lesser included offense of robbery; (2) it erred by not giving a pinpoint instruction on the element of force; (3) his trial counsel rendered ineffective assistance by not seeking an instruction on a claim of right defense; and (4) the trial court exceeded its authority by

imposing certain costs as victim restitution. Except to remand to correct the restitution order, we affirm the judgment.

FACTS AND PROCEEDINGS

Prosecution Evidence

On January 2, 2015, someone burgled Marvin and June S.'s home. The culprit stole guns, jewelry, and a truck. The truck was a maroon 2000 Ford diesel pickup. To steal the truck, the culprit backed it through a large padlocked gate, tearing the gate down. The sheriff's department recovered the truck that evening.

Two days later, in the early morning of January 4, someone stole the truck again. To steal it, the culprit cut a chain, pushed the truck into the road, started it there, and drove away.

Later that day, the S.s were driving in their second car, a Kia, when they saw defendant driving their truck toward them on the same road. They recognized the truck because it has a winch on the front and two large red "snatch blocks," one on each side of the winch.

The S.s turned around and followed the truck to a convenience store parking lot. June, then 84 years old, got out of the car to talk with a security guard, and Marvin, 87, pulled the car up crossways behind his parked truck. He walked up to the truck and manually locked its front doors. As he started to walk toward the store, defendant came out and they met each other. Marvin asked defendant, "What are you doing driving my truck?" Defendant's face went "completely blank."

Defendant did not respond. Instead, he ran to the truck, unlocked the door, got in, and locked the door. Marvin tapped on the door window with a "5 cell flash light" he was carrying and said, "I got a good look at you, boy." Defendant started the truck, put it in reverse, and backed into Marvin's car. Marvin became afraid. Defendant pulled forward and hit a steel post. Fearing for his safety, Marvin turned to run. Defendant

reversed the truck, and it bumped Marvin in his hip. Then defendant drove the truck forward over an embankment and left the scene.

Video of the incident filmed from the convenience store's surveillance camera was played to the jury.

Defense Evidence

Defendant testified on his own behalf. He denied having anything to do with the burglary of the S.'s home and theft of their truck on January 2, 2015, and the theft of their truck on January 4. He did, however, drive the truck on January 4. He said he was walking to the convenience store when he saw a friend, Brian Morris, at a house. He asked Morris for a ride to the store. Morris was busy helping the person who lived at the house work on a car, but he offered to let defendant drive his truck to the store and back. Morris gave him the keys to the truck.

Defendant drove the truck to meet his girlfriend because he did not have any money for the store. He then drove to the store and purchased food. After walking out of the store and toward the truck, he noticed an elderly gentleman with a "mag" light in his hand. The man came toward him and said, "I got you now." "I know who you are." The man did not say anything to him about the truck.

Defendant felt threatened. He stepped to the side and ran to the truck. He unlocked the truck with the key and got in while the man was close behind him. The driver's side window was down about six inches. The man jabbed the flashlight through the window toward defendant's face three or four times as defendant tried to start the truck.

Defendant knew a vehicle was parked behind the truck. He looked in the side mirror to avoid hitting the vehicle as he reversed the truck, but he felt a bump and realized he had hit it. He pulled forward to leave and hit a crash post in front of him that

he had not seen. He held the clutch in as the truck coasted backwards. Once he saw he was clear of the crash post, he drove away.

Defendant denied hitting the elderly man with the truck. As the truck was coasting back, the man jabbed the flashlight through the open window. The man was standing next to defendant and said, "I got a good look at you, boy," as defendant pulled off.

On cross-examination, defendant stated that after leaving the store, he parked the truck on the road where his friend was visiting. He yelled at his friend that he did not know what was going on with the truck, but something happened at the store. Defendant never talked with his friend after that.

Rebuttal Evidence

Deputy Sheriff Silver Parley interviewed defendant after arresting him. Defendant stated he borrowed the truck from a friend, but he refused to give Deputy Parley the friend's name because he did not want to be a snitch. Deputy Parley heard the friend's name for the first time at trial.

Defendant did not mention anything in the interview about having a conversation with the elderly gentleman. He clarified he "might have bumped him on his way out." By "him," he meant the elderly gentleman.

Defendant told Deputy Parley he abandoned the truck and left it running on the said of the road, but later in the interview, he stated the vehicle was gone.

Verdict and Judgment

A jury found defendant guilty of carjacking and second degree robbery in the incident at the convenience store. (Pen. Code, §§ 215, subd. (a); 212 (statutory section references that follow are to the Penal Code).) Based on items found in his possession at the time of arrest, defendant also pleaded no contest to possession of metal knuckles, carrying a dirk or dagger, misdemeanor possession of a device to ingest controlled

substances, and misdemeanor possession of hydrocodone. (§§ 21810, 21310; Health & Saf. Code, §§ 11364, subd. (a), 11350.) In a bifurcated proceeding, the trial court found true a prior prison term allegation. (§ 667.5, subd. (b).)

The court sentenced defendant to prison for 11 years four months, calculated as follows: the upper term of nine years for carjacking, eight months for each of the weapon possession counts, and one year for the prior prison term. The court sentenced defendant to concurrent terms of one year and six months on the device possession and hydrocodone possession counts respectively, and it stayed a five-year term on the robbery count under section 654. Additionally, the court ordered defendant to pay victim restitution in the amount of $19,839.

DISCUSSION

I

Jury Instructions

Defendant contends prejudicial error occurred individually and collectively when the trial court (1) did not instruct on grand theft as a lesser included offense of robbery; and (2) did not give defendant's requested pinpoint instruction on the force necessary to support convictions of robbery and carjacking. Since defense counsel did not request an instruction on a claim of right defense, defendant also argues he did not receive the effective assistance of counsel.

A. *Grand theft instruction*

Defendant claims the trial court erred by not instructing sua sponte on grand theft as a lesser included offense of robbery. He argues substantial evidence supported giving the instruction. The jury could have determined he did not commit a theft using force or fear because he testified he hit the Kia and the crash post accidentally, he did not control the truck's backward movement after he hit the post, and he did not strike Marvin with

the truck. He asserts the lack of a theft instruction was prejudicial, as it left the jurors with an all-or-nothing choice of either acquitting him or finding him guilty of robbery.

Defendant also claims the lack of a theft instruction left the jury with an all-or-nothing choice on the carjacking count. He contends jurors who did not believe he used force or fear sufficient for convicting him of robbery would have been "less reticent to acquit" him of carjacking if they could have convicted him of grand theft as a lesser included offense of robbery. We disagree with each of these arguments.

"California law requires a trial court, sua sponte, to instruct fully on all lesser necessarily included offenses supported by the evidence." (*People v. Breverman* (1998) 19 Cal.4th 142, 148-149.) This includes the obligation to instruct on every supportable theory, "not merely the theory or theories which have the strongest evidentiary support, or on which the defendant has openly relied." (*Id*. at p. 149.)

Conversely, a trial court need not instruct on lesser included offenses where the instruction is not supported by substantial evidence. (*People v. Avila* (2009) 46 Cal.4th 680, 705.) "This substantial evidence requirement is not satisfied by ' "*any* evidence . . . no matter how weak," ' but rather by evidence from which a jury composed of reasonable persons could conclude 'that the lesser offense, but not the greater, was committed.' (*People v. Cruz* (2008) 44 Cal.4th 636, 664.) 'On appeal, we review independently the question whether the trial court failed to instruct on a lesser included offense.' (*People v. Cole* [(2004) 33 Cal.4th 1158,] 1215.)" (*People v. Avila, supra,* at p. 705, original italics.)

Substantial evidence did not support an instruction on grand theft. Defendant incorrectly asserts his accidentally hitting the Kia and the crash post indicates he did not commit theft with force or fear. The defense of accident rebuts a prosecution's proof of a mental element of the crime. (*People v. Anderson* (2011) 51 Cal.4th 989, 996-998.) The mental element of robbery is not whether defendant intentionally used force or fear.

Rather, it is the specific intent to permanently deprive the victim of his or her property. (*Id*. at p. 994.)

"[T]he intent element of robbery does not include an intent to apply force against the victim or to cause the victim to feel fear. It is robbery if the defendant committed a forcible act against the victim motivated by the intent to steal, even if the defendant did not also intend for the victim to experience force or fear." (*People v. Anderson, supra*, 51 Cal.4th at pp. 991-992.)

If, as defendant claims, he accidentally hit the Kia and the crash post, there is nonetheless no dispute those actions were forcible actions that allowed him to get away and deprive Marvin of his truck. His testimony that he did not intend to hit the car nor the crash post is not substantial evidence that he committed only theft.

Moreover, defendant testified he believed he possessed the truck as a matter of right; that his friend loaned it to him to take to the store. But there is no dispute he used force or fear, accidentally or intentionally, to remove the truck from Marvin's presence. As a result, the evidence supports only an either-or choice for the jury: defendant was guilty of robbery or he was not guilty of any offense. In such circumstances, the court had no duty to instruct on the lesser included offense. (See *People v. Chestra* (2017) 9 Cal.App.5th 1116, 1123 [instructions on lesser included offenses of murder not required where evidence showed defendant either intentionally killed the victim with malice or he did not kill the victim]; *People v. Sinclair* (1998) 64 Cal.App.4th 1012, 1018-1020 [instructions on lesser included offenses of murder not required where, in light of defendant's total denial of committing the crime, reasonable jury would not find evidence of provocation to kill persuasive].)

In any event, defendant cannot show prejudice from the lack of an instruction on grand theft. We review a trial court's failure to instruct sua sponte on a lesser included offense under the state standard of harmless error. "[B]y virtue of the California Constitution, reversal is not warranted unless an examination of 'the entire cause,

including the evidence,' discloses that the error produced a 'miscarriage of justice.' (Cal. Const., art. VI, § 13.) This test is not met unless it appears 'reasonably probable' the defendant would have achieved a more favorable result had the error not occurred. (*People v. Watson* (1956) 46 Cal.2d 818, 836 (*Watson*).)" (*People v. Breverman, supra*, 19 Cal.4th at p. 149.)

"It is well established that '[e]rror in failing to instruct the jury on a lesser included offense is harmless when the jury necessarily decides the factual questions posed by the omitted instructions adversely to defendant under other properly given instructions.' [Citations.]" (*People v. Lancaster* (2007) 41 Cal.4th 50, 85.) That occurred here. The jury necessarily decided defendant used force or fear when it found him guilty of carjacking. The trial court instructed the jury that to prove carjacking, the prosecution must establish the defendant used force or fear to take the vehicle or to prevent the person from resisting. (§ 215, subd. (a); CALCRIM No. 1650.) By finding defendant guilty of carjacking, the jury necessarily determined he took the truck by means of force or fear.

Defendant argues we cannot rely on the jury's factual determination on the carjacking count. He asserts the failure to instruct on grand theft as a lesser included offense of robbery also left the jury with an all-or-nothing choice on the carjacking count. Had the jury been able to find defendant guilty of theft, it might "have been less reticent to acquit" him of carjacking.

Defendant's argument is speculation and not supported by the evidence. Theft is not a lesser included offense of carjacking. (*People v. Ortega* (1998) 19 Cal.4th 686, 693.) No matter how the court instructed on robbery and theft, the jury had to decide the issue of force or fear to resolve the carjacking count. That an instruction on theft would have given the jury a second chance to decide the issue of force or fear does not indicate the jury more likely than not would have decided in defendant's favor. The omission of a theft instruction was, at most, harmless error.

B. *Pinpoint instruction on force*

Defendant contends the trial court erred when it denied his request for a pinpoint instruction on the use of force. Defense counsel asked the court to instruct that the "force used for carjacking or robbery must be more than that which is needed merely to take the property from the victim." Counsel argued the instruction was necessary to prevent the jury from deciding that defendant's getting into the truck and driving it away was enough force to constitute a carjacking. The court denied the request, saying it would rely on CALCRIM No. 1650 to address the issue. The court did not err.

" 'We have suggested that "in appropriate circumstances" a trial court may be required to give a requested jury instruction that pinpoints a defense theory of the case . . . .' (*People v. Bolden* (2002) 29 Cal.4th 515, 558.) . . . [A] trial court may properly refuse an instruction offered by the defendant if it incorrectly states the law, is argumentative, duplicative, or potentially confusing (*People v. Gurule* (2002) 28 Cal.4th 557, 659), or if it is not supported by substantial evidence (*People v. Bolden, supra,* at p. 558)." (*People v. Moon* (2005) 37 Cal.4th 1, 30.)

The trial court correctly refused defendant's proposed instruction because it stated the law surrounding carjacking incorrectly. Generally, " ' "[t]he terms 'force' and 'fear' as used in the definition of the crime of robbery [and the crime of carjacking] have no technical meaning peculiar to the law and must be presumed to be within the understanding of jurors." ' (*People v. Mungia* (1991) 234 Cal.App.3d 1703, 1708, quoting *People v. Anderson* (1966) 64 Cal.2d 633, 640.)" (*People v. Lopez* (2017) 8 Cal.App.5th 1230, 1235.)

In addition, the proposed instruction incorrectly defined force for purposes of carjacking. For carjacking, the force required to commit the crime refers to whether the victim resisted, not whether the culprit exercised a certain amount of force. "In terms of the amount of force required to elevate a taking to a robbery, 'something more is required

than just that quantum of force which is necessary to accomplish the mere seizing of the property.' (*People v. Morales* (1975) 49 Cal.App.3d 134, 139 (*Morales*).) But the force need not be great: ' " '[a]ll the force that is required to make the offense a robbery is such force as is actually sufficient to overcome the victim's resistance . . . .' " ' (*People v. Burns* (2009) 172 Cal.App.4th 1251, 1259 (*Burns*), quoting *People v. Clayton* (1928) 89 Cal.App. 405, 411.) *Burns* in fact based its analysis not on the amount of force applied, but on the fact of the victim's resistance . . . . [¶] . . . [¶]

". . . For thefts of most personal property, there is an appreciable distinction between the quantum of force necessary to seize the property from an unresisting victim, and the additional force needed to seize the property if the victim fights back. It is thus possible to apply the rules from both *Morales* and *Burns*: if the thief is applying no more force than necessary to lift the property and carry it off, there is no robbery; if the victim resists, more force is needed and the theft becomes a robbery. But carjacking presents a circumstance in which the amounts of force may be identical in both situations. Given the power of even a slow-moving vehicle, a thief attempting to drive the car away need not apply additional force to shake off a victim trying to stop the car from moving. Under such a circumstance, *Morales* and *Burns* are in tension with one another, and either potentially is applicable.

". . . [W]e think the more appropriate rule is that of *Burns*. Under *Burns*, a victim's physical resistance will convert a theft into a robbery, regardless of the amount of force involved. (See *Burns, supra*, 172 Cal.App.4th at p. 1257.) . . . We therefore hold that a perpetrator accomplishes the taking of a motor vehicle by means of force, as defined under section 215 [the carjacking statute], when the perpetrator drives the vehicle while a victim holds on or otherwise physically attempts to prevent the theft." (*People v. Lopez, supra*, 8 Cal.App.5th at pp. 1235-1237.)

Defendant's proposed instruction defined force for purposes of carjacking in terms of the amount of force used as opposed to whether the victim resisted. His instruction

would have prevented the jury from considering the evidence of Marvin's attempts to stop him. Defendant testified that after he got in the truck and as the truck was coasting back after hitting the crash post, Marvin kept shoving his flashlight through the driver's side window toward defendant's face. Under defendant's instruction, the jury would have ignored the relevance of Marvin's physical attempts to stop defendant from driving away.

In any event, defendant was not prejudiced by the court's rejecting of his instruction. We review the denial of a pinpoint instruction under the *Watson* harmless error standard. (*People v. Larsen* (2012) 205 Cal.App.4th 810, 830.) Robbery and carjacking are both accomplished by force or fear. There was no dispute that defendant's actions in backing the truck into the Kia and then into the crash post placed Marvin in a state of fear. Since fear was not in dispute, there was no reasonable probability that, had the trial court given the jury defendant's proposed instruction, the jury would have returned a more favorable verdict.

C. *Ineffective assistance of counsel*

Defendant contends his trial counsel rendered ineffective assistance when he did not seek a jury instruction on the claim of right defense.

To establish ineffective assistance, defendant must show counsel's performance was deficient and that he was prejudiced as a result. (*Strickland v. Washington* (1984) 466 U.S. 668, 687-694 [80 L.Ed.2d 674].) "[A]s we have long observed, if the record does not preclude a satisfactory explanation for counsel's actions, we will not, on appeal, find that trial counsel acted deficiently. (See *People v. Mendoza Tello* (1997) 15 Cal.4th 264, 266 [] [' " '[i]f the record on appeal sheds no light on why counsel acted or failed to act in the manner challenged[,] . . . unless counsel was asked for an explanation and failed to provide one, or unless there simply could be no satisfactory explanation,' the claim on appeal must be rejected" '], quoting *People v. Wilson* (1992) 3 Cal.4th 926, 936;

and *People v. Pope* (1979) 23 Cal.3d 412, 426 [].)" (*People v. Stewart* (2004) 33 Cal.4th 425, 459.)

A satisfactory explanation explains counsel's actions: the law precluded a claim of right defense in this instance. "The claim-of-right defense provides that a defendant's good faith belief, even if mistakenly held, that he has a right or claim to property he takes from another negates the felonious intent necessary for conviction of theft or robbery." (*People v. Tufunga* (1999) 21 Cal.4th 935, 938.)

However, the claim-of-right defense is generally limited "to the perpetrator who merely seeks to effect what he believes in good faith to be the recovery of specific items of *his own* personal property." (*People v. Waidla* (2000) 22 Cal.4th 690, 734, fn. 12, italics added.) Although this court extended the defense to someone who aids and abets another in recovering the other's personal property (*People v. Williams* (2009) 176 Cal.App.4th 1521, 1528-1529), the defense is not available "to a defendant who has no right or claim of ownership to the property that he is accused of stealing, and who maintains that he acted as an agent of a third party who was the rightful owner of the property but was *not* a coprincipal in the commission of the charged offenses." (*People v. Anderson* (2015) 235 Cal.App.4th 93, 102, italics added (*Anderson*).)

Anderson's holding rests on the public policy discouraging the use of forcible self-help. " ' "It is a general principle that one who is or believes he is injured or deprived of what he is lawfully entitled to must apply to the state for help. Self-help is in conflict with the very idea of social order. It subjects the weaker to risk of the arbitrary will or mistaken belief of the stronger. Hence the law in general forbids it." ' [Citations.]" (*People v. Tufunga, supra,* 21 Cal.4th at pp. 952-953.) "To allow defendants who claim to have committed theft or robbery as agents for third parties to assert a claim-of-right defense based on the belief that the third party has a right or claim to the property taken would be contrary to the strong public policy against forcible self-help, because it would condone the type of self-help that subjects the weaker to the risk of being victimized as

the result of mistaken belief or arbitrary will of the perpetrator or the third-party 'principal.' " (*Anderson, supra*, 235 Cal.App.4th at p. 102, fn. omitted.)

Defendant acknowledges he did not own the truck, and there is no evidence his friend from whom he borrowed the truck was a coprincipal in the robbery and carjacking. As a result, the claim of right defense was not available to defendant, and his trial counsel was not deficient for not requesting an instruction on it.

Defendant claims *Anderson* does not apply. The defendant in *Anderson* sought out the victim and resorted to violence to obtain possession of his cousin's electronic benefits transfer card. In contrast, defendant claims he was already in rightful possession of the truck before the incident. This makes little difference, because the jury found defendant resorted to force or fear at the time he encountered Marvin. In effect, defendant retained or regained possession from Marvin by force or fear.

Defendant also relies on a footnote in *Anderson* to distinguish his case. The footnote reads: "We do not hold that the claim-of-right defense can never be available to a defendant charged with theft or robbery where there is evidence that the defendant took the subject property on behalf of a third party whom the defendant believed to be the rightful owner of the property. There may be circumstances where the defendant acts on behalf of a third party and the rationale for the defense outweighs the public policy against forcible self-help." (*Anderson, supra*, 235 Cal.App.4th at p. 102, fn. 5.)

Whatever the scope of *Anderson's* footnote, it does not apply here. Defendant took it upon himself to use force or fear to prevent Marvin from gaining possession of the truck without any knowledge, direction, or participation by defendant's friend. In that circumstance, the public policy against forcible self-help outweighs any interest defendant may have had in retaining possession for his friend. A simple check of the owner named on the truck's registration card would have resolved any dispute over ownership without the resort to force or fear.

Because defendant was not entitled to a claim of right defense, his trial counsel did not render ineffective assistance by not requesting an instruction on the defense.

II

Victim Restitution

The trial court ordered defendant to pay $19,839.82 in victim restitution. This amount included $486.30 for tools taken from the S.'s truck the first time it was stolen and for damage to their gate caused when the culprit backed the truck into it. Defendant contends the trial court abused its discretion and exceeded its authority by ordering him to compensate the S.s for these losses because they did not arise from the crimes for which defendant was convicted. Defendant acknowledges his trial counsel did not object to including these items in the restitution order. He argues his counsel rendered ineffective assistance by not objecting to the order.

The claim is not forfeited. By contending the trial court exceeded its authority by ordering restitution for costs that did not arise from his criminal conduct, defendant's claim asserts an unauthorized sentence. (*People v. Anderson* (2010) 50 Cal.4th 19, 26.) " 'An obvious legal error at sentencing that is "correctable without referring to factual findings in the record or remanding for further findings" is not subject to forfeiture.' [Citation.]" (*Ibid*.) We thus consider whether the trial court's inclusion of losses arising from the burglary was unauthorized. We conclude it was.

California law grants crime victims a right to restitution. "[A]ll persons who suffer losses as a result of criminal activity shall have the right to seek and secure restitution from the persons *convicted of the crimes causing the losses they suffer*." (Cal. Const., art. I, § 28, subd. (b)(13)(A), italics added.) "Restitution shall be ordered from the convicted wrongdoer in every case, regardless of the sentence or disposition imposed, in which a crime victim suffers a loss." (Cal. Const., art. I, § 28, subd. (b)(13)(B).) The trial court must order a defendant to pay victim restitution "in an amount established by

court order, based on the amount of loss claimed by the victim . . . or any other showing to the court." (§ 1202.4, subd. (f).) Recoverable losses include the value of stolen or damaged property. (§ 1202.4, subd. (f)(3)(A).)

The court's authority to award restitution is not unlimited. The restitution "shall be of a dollar amount that is sufficient to fully reimburse the victim or victims for every determined economic loss incurred as the result of *the defendant's criminal conduct*." (§ 1202.4, subd. (f)(3), italics added.) Where judgment is imposed and the defendant is sentenced to incarceration, the court may order restitution only for losses arising out of the criminal conduct for which the defendant was convicted. (*People v. Foalima* (2015) 239 Cal.App.4th 1376, 1395.) Although the criminal conduct may include conduct for which defendant was convicted on some counts and acquitted on others (*id*. at p. 1396), courts have not held criminal conduct for purposes of restitution includes conduct against which no criminal charges were brought. Such a holding would likely violate the constitutional provision that authorizes restitution for losses caused by "persons convicted of the crimes causing the losses they suffer." (Cal. Const., art. I, § 28, subd. (b)(13)(A).)

Defendant was not charged or convicted for either of the first two thefts of the truck and the tools it carried. His convictions were based solely on his actions at the convenience store after Marvin confronted him about the truck. The trial court thus abused its discretion by requiring defendant to pay restitution for losses that did not arise from any conduct for which defendant was convicted.

The Attorney General contends defendant pleaded no contest to taking the items stolen in the first burglary. This is incorrect. Defendant pleaded no contest only to charges arising from his possession of weapons, drugs, and drug paraphernalia at the time of his arrest. There is no evidence in the record showing defendant was charged with or pleaded to any crime arising out of either of the burglaries. The trial court abused its

discretion imposing restitution for costs arising from them. We will remand and direct the court to reduce the restitution order by $486.30 to $19,353.52.

DISPOSITION

The matter is remanded solely for the trial court to reduce the victim restitution order to $19,353.52. In all other respects, the judgment is affirmed.

HULL, J.

We concur:

BLEASE, Acting P. J.

BUTZ, J.